because there can be no deliberate intention to assent. STORY, EQ. JURIS., § 231 ; BISHOP, NON-CONTRACT LAW, § 513 ; POTHIER, TRAITÉ DES OBLIGAT., § 49. The modern English cases are in accord with this view. *Pitt* v. *Smith*, 3 Camp. 33 ; *Gore* v. *Gibson*, 13 M. & W. 623. But Pollock, C. B., in a later case has intimated that under no conditions is the contract absolutely void. *Matthews* v. *Baxter*, L. R. 8 Ex. 132. This shows a tendency to revive the harsher early English doctrines. 4 BL. COM. 26. In the United States, although the authorities are in hopeless conflict, the general tendency is to consider the contract as void. This view seems correct on principle, as there can be no contract if one party, through drunkenness or any other cause, is incapable of giving assent.

In equity, and now at common law since the introduction of equitable defences, contracts made while merely under the influence of liquor are voidable, but only if the other party has obtained an unfair advantage or has purposely caused the intoxication. *Cooke* v. *Clayworth*, 18 Ves. 12 ; *Crane* v. *Conklin*, 1 N. J. Eq. 346. With regard to testamentary capacity a sound doctrine has been established. Intoxication at the time of making a will does not invalidate it if the testator comprehended the nature of the act. *Bannister* v. *Jackson*, 45 N. J. Eq. 702 ; *Key* v. *Holloway*, 7 Baxter (Tenn.) 575. Where a testator destroys his will, either while suffering from delirium tremens or when merely under the influence of liquor it is held to be not revoked. *Brunt* v. *Brunt*, L. R. 3 P. & D. 37 ; *In the Goods of George Brassington, deceased*, 18 T. L. Rep. 15. These decisions are clearly correct as a valid revocation requires an *animus revocandi*.

It seems impossible, after a review of the authorities to deduce any broad principle with which all the cases where the effect of intoxication upon intent is in issue may be reconciled. The true rule in contracts and torts as well as in criminal law seems to be that if a specific intent or a special state of mind is necessary for liability, evidence of drunkenness is admissible to negative it, otherwise not. The *dictum* in the principal case is too sweeping, apparently recognizing no distinction between an act intentionally, that is voluntarily done, and an act done with specific intent, that is an intention ulterior to the mere moving of the muscles.

RECENT CASES.

ADMIRALTY — GENERAL AVERAGE — CONTRIBUTING INTERESTS. — A vessel was chartered to proceed to a foreign port and there take on a cargo, freight to be payable on the completion of the voyage home. On the voyage out in ballast, the vessel grounded, and a general average sacrifice was made. The voyage was subsequently completed and the freight due under the charter paid. *Held*, that the freight is liable to contribute to the general average sacrifice. *Steamship Carisbrook Co.* v. *London, etc., Ins. Co.*, [1901] 2 K. B. 861.

Though freight for the voyage on which a general average sacrifice is made, is liable to contribute, there is very little authority on the question of the liability of the homeward freight, already contracted for, to contribute to a general sacrifice on the outard voyage. One case has been found in England, and one in the United States, holding that where freight is a gross sum for the round voyage, the whole freight must contribute to a general average sacrifice on the outward voyage. *Williams* v.

London Assurance Co., 1 M. & S. 318; *The Brig Mary*, 1 Sprague (U. S. Dist. Ct.) 17. Military salvage was assessed on the same principle in *The Progress*, Edw. Adm. 210, 224. Logically, there is no ground for distinguishing the case of a vessel going out in ballast, under charter to bring back a cargo, from the cases above. Since the freight is payable only on the successful completion of the voyage, it is at risk and is insurable from the moment the vessel sets sail on the outward voyage. It therefore participates in the benefit from the sacrifice, and on principle should contribute to the general average.

ADMIRALTY — PUBLIC ADMINISTRATOR — PROPERTY FOUND UPON AN UNIDENTIFIED BODY AT SEA. — Money found upon the body of an unknown person floating at sea was paid into the registry of an admiralty court. Letters of administration were granted under Pub. St. Mass., c. 156, § 2, to the public administrator, by the probate court of the county in which the admiralty court was situated, and this suit was brought to determine rights in the fund in court after salvage had been awarded. *Held*, that the public administrator is entitled to the fund. *Gardner* v. *Ninety-nine Gold Coins*, 111 Fed. Rep. 552 (Dist. Ct., Mass.).

The decision involves the rights of three rival claimants, the finders, the United States and the administrator. Whatever the respective merits of the first two claims, they are admittedly subordinate to those of the real owner. The public administrator, holding office under statute and having letters of administration from a court of proper jurisdiction, stands like any other administrator in the place of the deceased. The decision therefore comes to this merely, that the claim of the owner of lost goods or his representative is paramount over all others. This is not, however, a final disposition of the case. The estate having been fully administered, the fund if any must be handed over to the Commonwealth. PUB. ST. MASS., c. 131, § 12. The interesting question, here expressly left open, as to who is ultimately entitled, must then be litigated. It is difficult to prophesy as to the outcome, since of the only two decisions found on the point, one awards the property to the finders, and the other to the United States. *Russell* v. *Forty Bales of Cotton*, Fed. Cas. No. 12,154; *Peabody* v. *Twenty-eight Bags of Cotton*, Fed. Cas. No. 10,869.

AGENCY — APPARENT AUTHORITY — VIOLATION OF INSTRUCTIONS. — An insurance agent had authority to accept risks upon property located within a certain prescribed territory. *Held*, that the company is not liable upon risks accepted by him outside of those limits. *Insurance Co. of N. A.* v. *Thornton*, 30 So. Rep. 614 (Ala.).

A principal is, in general, bound by all acts of his agent within the apparent scope of the agent's authority. *Union Mutual Ins. Co.* v. *Wilkinson*, 13 Wall. 222. Accordingly, an agent can bind his principal by acts that are direct violations of instructions, where persons dealing with the agent in reliance upon his ostensible authority, have neither actual nor constructive notice of such instructions. *Millville, etc., Ins. Co.* v. *Mechanics', etc., Assoc.*, 43 N. J. Law 652; *Ruggles* v. *American, etc., Ins. Co.*, 114 N. Y. 415. This reliance by the third party should, however, be reasonable and in good faith. See *Peabody* v. *Hoard*, 46 Ill. 242. If in any case the third person has reason to know that the agent's authority is restricted in a certain particular, he cannot hold the principal liable if it appears that the limitation was in fact transgressed. *Baines* v. *Ewing*, L. R. 1 Ex. 320. This can be upheld on the ground that reliance is placed, to this extent, upon the agent, not upon the principal. See *Crane* v. *Gruenewald*, 120 N. Y. 274. But there is nothing in the facts of the principal case as reported, to bring it within the rule of these cases. The decision is therefore wrong on principle; and it is contrary to the cases found directly in point. *Lightbody* v. *North American Ins. Co.*, 23 Wend. (N. Y.) 18; see also *Knox* v. *Lycoming Fire Ins. Co.*, 50 Wis. 671.

AGENCY — CORPORATIONS — KNOWLEDGE OF AGENT. — The president of a bank, acting in his private capacity, acquired knowledge of the status of certain insurance policies, which were later pledged to the bank. *Held*, that his knowledge did not affect the later transaction unless he participated therein. *Smith* v. *Carmack*, 64 S. W. Rep. 372 (Tenn., Ch. App.).

In general, the knowledge of the agent is the knowledge of the principal. *McGurk* v. *Metropolitan, etc., Co.*, 56 Conn. 528; *Hoover* v. *Wise*, 91 U. S. 308. This rule should apply to all knowledge, however acquired, which it is the duty of the agent to communicate. *The Distilled Spirits*, 11 Wall. 356; *Hart* v. *Farmers, etc., Bank*, 33 Vt. 252. The rule is based on common sense principles, and therefore does not

apply where it would be clearly unreasonable. *Blackburn* v. *Vigors*, 12 App. Cas. 531, 537. So the knowledge is not imputed when the agent is dealing with the principal for his own benefit. *Allen* v. *South Boston R. R. Co.*, 150 Mass. 200, 206. Since corporations can act only through agents, the rule is of peculiar importance where they are concerned. Its application is difficult, since no principal exists capable of actual knowledge. See 6 SOUTHERN L. REV. N. S. 793. If the agent, while possessing the knowledge, acts for the corporation, the knowledge undoubtedly affects the transaction. *Union Bank* v. *Campbell*, 4 Humph. (Tenn.) 394. But where, as in the principal case, there is no duty to communicate, and it does not appear that the agent participated in the later transaction or was cognizant of it, his knowledge should not be imputed to the corporation.

AGENCY — INDEPENDENT CONTRACTOR — LIABILITY OF EMPLOYER. — The defendant railway company employed an independent contractor to construct a portion of its railway across a highway. The contractor negligently failed to put lights on an embankment thrown up on the highway; and the plaintiff in consequence was injured. *Held*, that the defendant is liable. *Deming* v. *Terminal Ry. of Buffalo*, 169 N. Y. 1. See NOTES, p. 485.

BANKRUPTCY — PROVABLE DEBTS — JUDGMENT FOR FINE. — The defendant was fined for keeping a disorderly house, and judgment was entered against him. Thereafter he was declared bankrupt and the state filed its claim for the amount of the fine. *Held*, that such a claim is not a debt provable against the bankrupt's estate. *In re Moore*, 111 Fed. Rep. 145 (Dist. Ct., W. D. Ky.).

A literal application of § 63 of the Bankruptcy Act would make the claim provable under the head of a fixed liability as evidenced by a judgment. Since § 17 discharges all provable debts except those of certain classes to which the debt in question does not belong, the fine imposed by the state would be included in the discharge if the statute were literally construed. Under former United States bankruptcy laws the rule has been laid down that debts due to the state are not barred unless specially mentioned, on the ground that the state is not generally bound by statutes except when expressly referred to. *United States* v. *Herron*, 20 Wall. 251. The same rule has been applied under the present act. *In re Baker*, 96 Fed. Rep. 954. Moreover it seems fair to suppose that Congress did not intend to interfere with the criminal administration of a state by discharging fines imposed as punishments. See *In re Sutherland*, 3 N. B. R. 314; and *cf. Turner* v. *Turner*, 108 Fed. Rep. 785, and *In re Baker*, *supra*. The only exactly parallel case found under the present act is *contra*, but under former acts the decisions have been in accord with the better view adopted in the principal case. *In re Alderson*, 98 Fed. Rep. 588; *In re Sutherland*, *supra*; *cf. Bancroft* v. *Mitchell*, L. R. 2 Q. B. 549.

BANKRUPTCY — SUFFERING JUDGMENT — FAILURE TO ACT AS AN ACT OF BANKRUPTCY. — The Bankruptcy Act of 1898, § 3 *a*, provides that "Acts of bankruptcy by a person shall consist of his having . . . suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference." Judgment was entered against the defendant without his procurement, upon a note and irrevocable power of attorney to confess judgment, and a subsequent levy and sale left him entirely without means. *Held*, that the judgment and levy were a preference under §§ 3 *a*, 60 *a*; and that the defendant's failure to vacate the preference was an act of bankruptcy. *Wilson Bros.* v. *Nelson*, 22 Sup. Ct. Rep. 74.

Under the Act of 1867, §§ 39, 35, a judgment suffered by an insolvent debtor was not an act of bankruptcy unless there was an intent to give a preference; and the Supreme Court refused to infer that intent from mere passive non-resistance. *Wilson* v. *City Bank*, 17 Wall. 473. The Act of 1898, by the clause under discussion, seems on the contrary to make the result obtained by the creditor, and not the intent of the debtor, the essential fact. The decision in the principal case was reached by a divided court. The minority thought that to constitute an act of bankruptcy an exercise of will was requisite, and that the present act was not so different from the Act of 1867 as to demand a departure from *Wilson* v. *City Bank*, *supra*. The opinion of the majority is much to be preferred. It follows what seems to be the natural import of the words, and is in accordance with most of the decisions in the lower courts. *In re Moyer*, 93 Fed. Rep. 188; see 13 HARV. L. REV. 57; *contra*, *Duncan* v. *Landis*, 106 Fed. Rep. 839.

CONTRACTS — CONDITIONS PRECEDENT — ARCHITECT'S CERTIFICATE. — The plaintiff contracted to build a house for the defendant, payment to be conditioned on production of the architect's certificate. The plaintiff claimed payment in spite of the refusal of the certificate. After finding specially that the reason for the architect's refusal was dissatisfaction with the work, the jury gave a general verdict in favor of the plaintiff. *Held*, that the general verdict must stand. *Wicker* v. *Messinger*, 12 Ohio Circ. Dec. 425. See NOTES, p. 481.

CONTRACTS — JOINT AND SEVERAL DEBTORS — RELEASE. — A bank obtained a judgment against A and B jointly and severally for £6000. On payment of £3000 in cash and notes by B, the bank gave him a receipt in full discharge of all its claims against him. The bank then claimed a debt of £3000 against A as the balance of the judgment debt. *Held*, that the receipt to B was equivalent to a release of B from the entire debt, and consequently operated to destroy the debt as against A. *In re E. W. A.*, [1901] 2 K. B. 642 (C. A.).

A release under seal to one of two joint or joint and several debtors operates to release the other also. *Clayton* v. *Kynaston*, 2 Salk. 573, 574; *Hale* v. *Spaulding*, 145 Mass. 482. This is due to the peculiar nature of a joint liability; the right of the creditor is regarded as indivisible, and a common law release, which operates as an extinguishment of the debt, although given to but one of the debtors, must still have the legal effect of destroying the entire obligation. *Durrell* v. *Wendell*, 8 N. H. 369, 372. Since this is a technical rule and often violates the intent of the parties, the courts have refused to give the same effect to a mere agreement not to sue one of the joint debtors. *Hutton* v. *Eyre*, 6 Taunt. 289; *Berry* v. *Gillis*, 17 N. H. 9. The argument of circuity of action, which ordinarily gives those agreements the effect of a release, is not applicable in a suit against the other debtor. *Garnett* v. *Macon*, 2 Brock. (U. S. Circ. Ct.) 185, 219. American courts have expressly declared that the technical rule should be confined to common law releases. *Line* v. *Nelson*, 38 N. J. Law 358; *cf. Grovenor* v. *Signor*, 88 N. W. Rep. 278. This would seem to be the proper rule, and no authority has been found to support the principal case.

CONTRACTS — OFFER AND ACCEPTANCE — PERFORMANCE IN IGNORANCE OF REWARD OFFERED. — The defendant offered a reward for the arrest and conviction of certain criminals. The plaintiff's services led to such arrest and conviction, but were substantially all rendered before the reward was offered or while he was ignorant of the offer. *Held*, that there was no acceptance of the offer. *Williams* v. *West Chicago St. R. R. Co.*, 61 N. E. Rep. 456 (Ill.). See NOTES, p. 484.

CONSTITUTIONAL LAW — RIGHT TO PRACTISE MEDICINE — DISCRIMINATING EXEMPTIONS. — A statute (Wis. Laws, 1901, c. 306) makes an examination by the state board a prerequisite to a license to practise medicine, with a proviso exempting students then matriculated in medical colleges in the state which prescribed certain specified courses. *Held*, that the act is not unconstitutional as denying to graduates of medical colleges outside the state the equal protection of the laws. *State ex rel. Kellogg* v. *Currans*, 87 N. W. Rep. 561 (Wis.).

The regulation of occupations, the pursuit of which by incompetent persons is dangerous to the public, is a recognized branch of legislative power. *Dent* v. *West Va.*, 129 U. S. 114. To secure proper qualifications the legislature may make any classification bearing some reasonable relation to that purpose. When any line is drawn its artificial character will render it unjust as to some, but unless the law is clearly arbitrary the courts should not declare it invalid. *Ex parte Spinney*, 10 Nev. 323; *People* v. *Phippin*, 70 Mich. 6. In the principal case the requirement imposed on the applicant is itself reasonable, but the complaint of unjust discrimination because of the exemption, is of force unless the favored class can be distinguished by some characteristic which might reasonably justify the exemption. It might perhaps be said that the legislature could rely on the character of the education furnished by the medical colleges of its own state, while it could not be expected to investigate and classify all colleges outside the state. On this ground the decision may be supported. Analogous statutes have been frequently upheld. *People* v. *Phippin*, *supra*; *contra*, *In re Day*, 181 Ill. 73.

CORPORATIONS — EMBEZZLEMENT BY CASHIER — LIABILITY OF DIRECTORS FOR NEGLIGENCE. — The cashier of a bank was enabled to embezzle funds by the failure of the directors to exercise proper supervision. The bank becoming insolvent, the

receiver sues the directors. *Held*, that they are liable. *Campbell* v. *Watson*, 50 Atl. Rep. 120 (N. J. Ch.). See NOTES, p. 479.

CORPORATIONS — RIGHT OF ONE CORPORATION TO CONTROL ANOTHER — INJUNCTION AGAINST VOTING. — A general act permitted incorporation for specified purposes, "or for engaging in any other species of trade or business;" the corporation so formed to have power "for carrying on all kinds of business within the objects and purposes of the company as expressed in the articles of incorporation." Under this statute a smelting company was formed, its articles stating one purpose to be the holding of stock in other companies. After it had obtained control of the stock of a previously existing smelting company, the minority stockholders of the latter sued to restrain the new corporation from voting as a stockholder in the old. *Held*, that an injunction should issue. *Parsons* v. *Tacoma Smelting, etc., Co.*, 65 Pac. Rep. 765 (Wash.).

The court, relying on the rule of statutory construction that power to hold stock must be expressly granted, denies that the defendant has such power. This rule served well for corporations specially chartered, for it protected stockholders from unexpected diversion of corporate funds and construed strictly state grants. See *Franklin Co.* v. *Lewiston Institution for Savings*, 68 Me. 43; see also note, 36 Am. St. Rep. 134. In the principal case, however, these reasons fail. The articles of incorporation warn prospective stockholders and the above extracts from the general statute hardly admit a strict construction on this point. What other sound principle a construction favoring the power in question would offend, is not clear. The particular injunction granted, however, was amply justified. When one corporation has voting control over another, the exercise of which is likely to defraud minority interests, equity jurisdiction to prevent such exercise is established, though vaguely defined. *Memphis & Charleston R. R. Co.* v. *Woods*, 88 Ala. 630; *cf. American, etc., Co.* v. *Linn*, 93 Ala. 610. Such exercise of control by a corporation having corporate interests overshadowing those it has as stockholder, is held fraudulent even where similar conduct in one or more individuals as majority stockholders would not be questioned. See *Glengary, etc., Co.* v. *Boehmer*, 62 Pac. Rep. 839 (Col.).

CRIMINAL LAW — LARCENY — INTENT TO DEPRIVE PERMANENTLY. — To secure a reward offered for the arrest of any person stealing goods from a certain store, a detective, through a confederate, induced an employee in the store to steal a watch and bring it to him, whereupon he at once returned it to its owner in accordance with his original plan. *Held*, that the detective is guilty of larceny of the watch, the *animus furandi* being found in the intent to secure and keep the reward. *Slaughter* v. *State*, 88 S. E. 854 (Ga.).

The felonious intent necessary to larceny does not exist unless the wrong-doer intends to deprive the owner of his property absolutely, either permanently or for a very considerable length of time. *Rex* v. *Crump*, 1 C. & P. 658; *State* v. *South*, 28 N. J. Law 28. It is well settled that holding property for a reward, intending never to return it unless such reward is offered, is within this rule. *Commonwealth* v. *Mason*, 105 Mass. 163; *Berry* v. *State*, 31 Oh. St. 219. But simply holding property temporarily in the hope of a reward, intending to return it at all events, is not larceny. *Regina* v. *Gardner*, 9 Cox C. C. 253. In the principal case the detective's intention throughout was to return the property to the owner unconditionally; and the fact that he meant to profit collaterally by the transaction could not, under the circumstances, furnish the felonious intent. *Cf. Regina* v. *Holloway*, 3 Cox C. C. 241. It would seem, however, that a conviction might have been had on another ground. The servant took the watch with felonious intent, and by the procurement of the detective. The latter was therefore an accessory before the fact. But in Georgia such a larceny as this is a misdemeanor, and in misdemeanors all are held as principals. CODE OF GA., § 4409; *Kinnebrew* v. *State*, 80 Ga. 232.

CRIMINAL LAW — LAWFUL ACT RESULTING IN UNLAWFUL ACTS BY OTHERS. — The appellant, a Protestant lecturer, was in the habit of holding meetings in the streets of Liverpool, at which he spoke in highly insulting, though lawful language of the Catholic religion. As a result there were frequent breaches of the peace by Catholics among his hearers. He intended to continue the meetings. *Held*, that he was properly put under recognizance to be of good behavior. *Wise* v. *Dunning*, 18 T. L. R. 85 (Eng., K. B.).

Cases of this class raise the interesting question whether an act lawful in itself be-

comes unlawful if a breach of the peace by others results from the doing of it. It seems clear on principle that it can be punishable criminally only if the actor has the *mens rea;* that is, if he intends an unlawful result, or if he is guilty of culpable negligence. *Cf. Beatty* v. *Gillbanks*, 9 Q. B. D. 308. In the principal case it is admitted that the appellant did not intend to induce a riot. In order to find negligence, it is necessary to find that he was under a duty to use care. It is submitted that so long as a man's acts are lawful, and he does not intend to induce others to act unlawfully, there is no duty upon him to guard against the unlawful acts others may choose to commit. *Cf. State* v. *Evans*, 124 Mo. 397. The case seems not fairly distinguishable from *Beatty* v. *Gillbanks*, *supra*. The view of the court would result in placing a burdensome restriction on the right of free speech, and personal liberty in general.

EQUITY — INJUNCTION — CONTRACT TO TRADE EXCLUSIVELY WITH PLAINTIFF. — The defendant contracted to purchase from the plaintiff all the electrical energy that he might require in his hotel for a period of five years. *Held*, that he may be enjoined from purchasing electricity for his hotel from any one other than the plaintiff during the time covered by the agreement. *Metropolitan Electric Supply Co.* v. *Ginder*, [1901] 2 Ch. 799. See NOTES, p. 480.

EQUITY — INJUNCTION — DISCRIMINATION BY PUBLIC SERVICE CORPORATIONS. — The plaintiff, a water company, sought an injunction against a rival water and sewer corporation, restraining the latter from so discriminating in its sewerage rates against the plaintiff's patrons that loss of business would result to the plaintiff. *Held*, that the injunction was properly issued. *City of Mobile* v. *Bienville Water Supply Co.*, 30 So. Rep. 445 (Ala.). See NOTES, p. 478.

EVIDENCE — HEARSAY — PROOF OF CONTENTS OF LOST DEED. — The plaintiff offered, as proof of the contents of a lost deed, the testimony of a witness who had heard the deed read to the grantee by a subscribing witness. *Held*, that this evidence was wrongly excluded. *Laster* v. *Blachwell*, 30 So. Rep. 663 (Ala.).

There are some decisions in regard to lost wills in accord with this case. *Morris* v. *Swaney*, 7 Heisk. (Tenn.) 591. The better considered view is, however, *contra*. *Coxe* v. *England*, 65 Pa. St. 212; *Propst* v. *Mathis*, 115 N. C. 526, *semble*. The objection that the evidence is hearsay seems generally to have been overlooked in the former class of cases. But it is obviously offered to prove an ultimate fact, the contents of the deed, by the statement of another and not from the personal knowledge of the witness. To show that the contents of two writings are the same it is held enough for the witness to have examined one while another person read the other. *Pickard* v. *Bailey*, 26 N. H. 152. But this is a "classical exception" to the general rule and it is unsafe to reason from it to other cases. See 1 GREENL., EV., 16th ed., 430 *a*. Moreover the balance of convenience appears to be against admitting such testimony as that offered in the principal case. To allow proof of the contents of lost documents by mere hearsay would occasion great uncertainty; and the courts have been exceedingly strict concerning the sort of proof required for such writings. See *Davis* v. *Sigourney*, 8 Met. (Mass.) 487.

LIBEL — PUBLICATION IN WILL — LIABILITY OF TESTATOR'S ESTATE. — *Held*, that the probate of a will containing libellous matter is a publication of the libel, for which the estate of the testator is liable. *In re Gallagher*, 49 Pitts. L. J. 161 (Pa., Orphans' Ct.). See NOTES, p. 483.

MANDAMUS — DISCRETIONARY POWER — FRAUDULENT ASSESSMENT. — A Board of Equalization, having power to assess the capital stock of corporations at its fair cash value under rules to be established by itself, fraudulently assessed certain corporations in such a way as practically to exempt their capital stock. *Held*, that the Board may be compelled by *mandamus* to assess the capital stock in accordance with a rule prescribed by the decree. *State Board of Equalization* v. *People*, 61 N. E. Rep. 339 (Ill.).

The decision seems to be correct, for there is no doubt that the discharge of a discretionary duty may be controlled by *mandamus* where the defendants have acted fraudulently or in bad faith. *Detroit* v. *Hosmer*, 79 Mich. 384. It is true that in most of the cases good faith demanded precisely the action directed by the court, whereas the principal decision apparently lays down one rule of assessment where, originally, some other might fairly have been followed. In at least one other case, however, the

legitimate scope of discretion as originally granted, was clearly thus narrowed. *State* v. *Board of Public Schools*, 134 Mo. 296. Moreover, such restriction may often be very advisable, since the defendants, in this class of cases, must always have shown a disposition not to comply with their duty.

PERSONS — HUSBAND AND WIFE — VOLUNTARY ANTENUPTIAL CONVEYANCE. — Just before marriage, X conveyed all his property on trust for himself for life, with remainders over. The plaintiff married him in ignorance of the conveyance, and now brings suit to have it set aside. *Held*, that as X is still alive and has the income of the property with which to support the plaintiff, she is entitled to no present relief. *Potter* v. *Fidelity, etc., Co.*, 49 Atl. Rep. 86 (Pa.).

In similar cases in the United States, the widow is allowed, after the death of the husband, to obtain dower in the lands conveyed. The proper basis for such decisions seems to be the duty of good faith towards each other incurred by persons engaged to be married. See 14 HARV. L. REV. 452. The deed, however, is set aside only to the extent of allowing dower. *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99. Similarly, since a wife has no control of her husband's property, the deed should not during his lifetime be declared wholly void, unless perhaps when the husband has thereby rendered himself unable to support his wife. The result in the principal case seems so far correct. But see, *contra*, *Beere* v. *Beere*, 79 Ia. 555; *Way* v. *Way*, 67 Wis. 662. Since, however, the deed as it stands bars the possibility of dower, or the corresponding statutory right in the personal estate, a decree that the deed is void so far as it interferes with those rights would seem proper, and this would make further litigation unnecessary. In the only two cases found directly in point, except those above cited, such a decree was made. *Petty* v. *Petty*, 4 B. Mon. (Ky.) 215; *Leach* v. *Duvall*, 8 Bush (Ky.) 201.

PERSONS — MORTGAGE BY INFANTS — AVOIDANCE. — The plaintiff, while an infant, obtained advances from a building society, to purchase a piece of land and to erect houses thereon. The land was conveyed to the infant by the vendor and the next day mortgaged to the society to secure the advances. On learning of the plaintiff's infancy, the society took possession of the property. When the plaintiff attained her majority, she repudiated the contract and mortgage, and brought action for possession. *Held*, that the mortgage is void; yet, since but for the advance of the purchase money the vendor would have had a vendor's lien, the society can to the extent of the purchase money stand in the vendor's shoes. *Thurstan* v. *Nottingham, etc., Society*, [1902] 1 Ch. 1 (C. A.).

The lower court held that the plaintiff could not repudiate the mortgage, and affirm the conveyance, on the unsatisfactory ground that they were one transaction. See comment in 14 HARV. L. REV. 388. The Court of Appeal, though recognizing the hardship on the society, felt able to protect it only so far as could be done on the doubtful theory of vendor's lien. It would seem that the court might, on sound legal principle, have protected the society to the full extent of its advances. When an infant, on coming of age, disaffirms a contract, he is bound to restore whatever of the consideration still remains in his hands. *Badger* v. *Phinney*, 15 Mass. 359. If he no longer has the consideration *in specie*, such of his property as can be identified as the direct proceeds of the consideration is liable to the other party's claim. *MacGreal* v. *Taylor*, 167 U. S. 688. On this view, though it be admitted that the mortgage is void, the plaintiff would, unless willing to perform the contract, hold land and buildings, the proceeds of the advances, subject to a constructive trust for the society. *Cf. Dyer* v. *Jacoway*, 42 Ark. 186.

PERSONS — PARENT AND CHILD — DUTY TO SUPPORT. — By a divorce decree custody of the minor children was awarded to the wife. *Held*, that money expended by her in support of the children after the divorce, can be recovered from the father. *Eldred* v. *Eldred*, 87 N. W. Rep. 340 (Neb.).

There being no state statute on the subject, the case assumes the existence of a common law duty resting on a father to support his minor children. The conflict of authority on so fundamental a point is striking. In England and in many American jurisdictions it is denied that such a common law duty exists. *Shelton* v. *Springett*, 11 C. B. 452; *Kelley* v. *Davis*, 49 N. H. 187. The early English authorities seem to support this view. See *Mortimore* v. *Wright*, 6 M. & W. 482. It is said that the common law prefers to leave the enforcement of moral duties of this kind to the natural impulses of the individual. 1 CHIT. BL. 448, note. Some American jurisdictions

hold that the common law does impose such a duty. *Brow* v. *Brightman*, 136 Mass. 187; *Hall* v. *Green*, 87 Me. 122. An early statute, 43 Eliz. c. 2, which is a part of the common law of this country, requires fathers, if able, to support poor and impotent children. On this statute is based the criminal liability of a parent for neglect resulting in injury to the health of a child of tender years. *Rex* v. *Friend*, R. & R. 20. The statute is construed as referring only to children unable to care for themselves. See *Finch* v. *Finch*, 22 Conn. 411. It would seem that the doctrine tacitly adopted in the principal case can be supported only if the children were within this statute.

PERSONS — PARENT AND CHILD — SUPPORT OF CHILDREN AFTER DIVORCE. — By a decree of divorce, the wife was awarded alimony and given custody of the children, no express provision being made for their support. *Held*, that the father's liability for their maintenance continues. *Eldred* v. *Eldred*, 87 N. W. Rep. 340 (Neb.).

This question could arise only in jurisdictions recognizing the father's legal duty to support his children. In many such jurisdictions it is held that the right to services and the duty to support go hand in hand; and accordingly that, when the children are given into the keeping of the mother, the father's duty to support them ceases. *Burritt* v. *Burritt*, 29 Barb. (N. Y.) 124. Other authorities give such effect to the decree only when it is coupled with an award of alimony. *Draper* v. *Draper*, 68 Ill. 17. It would seem that alimony ought to be regarded as exclusively for the wife. See *Richmond* v. *Richmond*, 2 N. J. Eq. 90. But when she is given custody of the children most courts undoubtedly allow that fact to influence them in fixing the amount of the alimony. The balance of authority seems, however, to incline toward the rule of the principal case, on the very good ground that the father ought not to be allowed by his own wrong to cast off his obligation to his children. *Pretzinger* v. *Pretzinger*, 45 Oh. St. 452. It would seem that all difficulty might be avoided by statutes requiring courts in all such cases to make separate awards for the wife and for the children.

PROPERTY — ANCIENT LIGHTS — RIGHT TO AN EXTRAORDINARY AMOUNT OF LIGHT. — The plaintiffs, who had acquired an easement of light, needed an extraordinary amount of light for their business. According to the finding of the court, the defendants' newly erected building cut off a substantial amount of light, but enough remained for all ordinary purposes of inhabitancy or business. *Held*, that the plaintiff is entitled to relief. *Warren* v. *Brown*, [1902] 1 K. B. 15 (C. A.).

Up to within forty years, it seemed to be settled law in England that action would not lie for obstruction of ancient lights merely because the plaintiff had less light than formerly, but only if material inconvenience in ordinary occupations was caused. *Fishmongers' Co.* v. *East India Co.*, 1 Dick. 163; *Back* v. *Stacey*, 2 C. & P. 465. Some cases, of late years, have followed the old rule. *Lanfranchi* v. *MacKenzie*, L. R. 4 Eq. 421. The tendency, however, has been toward the view adopted in the principal case by the Court of Appeal. *Lazarus* v. *Artistic Photographic Co.*, [1897] 2 Ch. 214; *cf.* also *Mackey* v. *Scottish Widows, etc., Society*, Ir. Rep. 11 Eq. 541. Logically, the decision in the principal case is sound. On grounds of expediency, however, it is open to objection. If a building cannot be put up which would cut off a substantial amount of light from neighboring ancient windows, even though sufficient light is left for all ordinary occupations, an unnecessarily serious restraint is placed upon the beneficial use of property. Prescriptive easements of light are not recognized in this country; but some jurisdictions hold that the grantee of land has an easement of light by implied grant over the adjoining unimproved land of his grantor. *Sutphen* v. *Therkelson*, 38 N. J. Eq. 318. It is to be hoped that those jurisdictions will not adopt the rule of the principal case, as to what constitutes actionable interference.

PROPERTY — CHATTELS SEVERED BY DISSEISOR — ACTION BEFORE RE-ENTRY. — The defendant, being in possession of the plaintiff's land under a *bona fide* claim of title, cut down and removed trees. *Held*, that before re-entry, neither the logs nor their value can be recovered. *Clarke* v. *Clyde*, 66 Pac. Rep. 46 (Wash.). See NOTES, p. 486.

PROPERTY — STATUTE OF LIMITATIONS — ACCRUAL OF ACTION ON COVENANT OF WARRANTY. — The defendant in 1886 conveyed to the plaintiff with covenant of warranty land then possessed, under contract of purchase, by a third person, who in September 1890 obtained a decree for a conveyance. *Held*, that an action on the covenant of warranty, brought in August 1895, is not barred by a five-year statute of limitations. *Watson* v. *Heyn*, 86 N. W. Rep. 1064 (Neb.).

Covenants of warranty are generally treated as coextensive with covenants for quiet enjoyment. See RAW., COV., 5th ed., § 114. These two covenants have at least the common characteristic that in general they remain unbroken till eviction by a paramount owner. *Real* v. *Hollister*, 20 Neb. 112; *Howard* v. *Maitland*, 11 Q. B. D. 695. If, however, when the land is conveyed, the paramount owner already has possession, a breach occurs immediately. *Ilsley* v. *Wilson*, 42 W. Va. 757, 772; *Shattuck* v. *Lamb*, 65 N. Y. 499; see RAW., COV., 5th ed., § 139. In the principal case the paramount owner, though his right was at first purely equitable, was always entitled to the possession which he held. Therefore under the principle apparently governing the authorities, that these covenants are broken when the covenantee is excluded from possession by one having a paramount right, and then only, it follows that when the defendant's deed was delivered, his covenant was broken and the statute began running. A former opinion by the Nebraska court adopts such a view. See *Heyn* v. *Ohman*, 42 Neb. 693. The present decision, that a second breach occurred when the decree divested the title, is opposed to the established principle of such cases as *Real* v. *Hollister*, *supra*.

PROPERTY — VESTED AND CONTINGENT INTERESTS. — Subject to a life interest, a testator devised all his estate to unborn children of his son, but a subsequent clause provided that no such child should acquire any interest unless he should live to the age of thirty. *Held*, that the devise was not void for remoteness, because children subsequently born took at birth a vested interest. *Chapman* v. *Cheney*, 61 N. E. Rep. 363 (Ill.).

A conditional future interest is vested or contingent according as it is subject to a condition subsequent or precedent, and the nature of the condition depends on the intention with which it is created as shown by the language used. GRAY, PERP., §§ 101, 102, 108. Generally, if the conditional element forms a part of the description, the interest is construed as contingent, while if it is added in a subsequent clause the interest is held to be vested. *Price* v. *Hall*, L. R. 5 Eq. 399; *Blanchard* v. *Blanchard*, 1 Allen (Mass.) 223. But, although such a clause would ordinarily operate to divest interests previously given, an express direction as to the period of vesting may, on a proper construction of the whole instrument, change the character of those interests, making them contingent. *Russel* v. *Buchanan*, 7 Sim. 628. In the principal case the proviso appears to make expressly contingent the interests which from the description alone would be vested on the birth of a child; and the decision, in following the common tendency to favor the vesting of estates, seems to do violence to the expressed intention of the testator.

SALES — STOPPAGE IN TRANSITU — END OF TRANSIT. — A consignee having failed to remove his goods from the car within the time required by the rules of the railway company, the latter stored the goods in its sheds, where they remained for two months, subject to freight and storage charges. At the end of this time the consignor notified the company not to deliver the goods. *Held*, that the right of stoppage *in transitu* still remained. *Brewer Lumber Co.* v. *Boston & Albany R. R. Co.*, 60 N. E. Rep. 548 (Mass.).

It is often said that the right of stoppage *in transitu* exists only so long as the goods remain in the hands of the carrier as carrier. See *Langstaff* v. *Stix*, 64 Miss. 171. This would terminate the right of stoppage simultaneously with the carrier's strict liability, as to the exact duration of which different rules prevail. See *Richards* v. *Michigan, etc., R. R Co.*, 20 Ill. 404; 9 HARV. L. REV. 153. Most of the cases involving the right of stoppage are consistent with the rule suggested, though commonly the termination of the carrier's strict liability was not the test expressly applied. *Cf. Seymour* v. *Newton*, 105 Mass. 272; *Buckley* v. *Furniss*, 15 Wend. (N. Y.) 137. Some cases, however, have been found that cannot be harmonized with this view. *Cf. Greve* v. *Dunham*, 60 Ia. 108. This is true of the principal case, which furthermore indicates that lapse of time does not affect the right. The rule upon which the decision rests is, however, thoroughly sound. The right of stoppage should remain until delivery, or until the carrier, by virtue of some agreement or previous understanding between himself and the consignee, wholly apart from the original employment as carrier, has constituted himself the agent of the consignee to hold the goods. See *Jeffris* v. *Fitchburg R. R. Co.*, 93 Wis. 250.

STATUTE OF FRAUDS — SUBSEQUENT MEMORANDUM — EFFECT ON INTERMEDIATE VOLUNTARY CONVEYANCE. — In consideration of the plaintiff's promise to

marry him, X orally promised to convey certain land to her. Subsequently he voluntarily conveyed it to third persons and recorded the deed. The plaintiff, in ignorance of the conveyance afterwards, married him. Sixteen years later X made a deed to her of the same land, reciting the parol agreement. The plaintiff brings suit to be let into possession as owner. *Held*, that she is entitled to the land. *Brinkley* v. *Brinkley*, 39 S. E. Rep. 38 (N. C.).

The court rests the decision on the ground that a conveyance by a man just before marriage and without the knowledge of the intended wife is a fraud on her marital rights. It is, however, difficult to see why this should entitle her to more than a decree that as far as the deed interferes with her dower it is void. *Leach* v. *Duvall*, 8 Bush (Ky.) 201. See p. 494, *supra*. Nor is a voluntary deed which is recorded, void under the state code as against a subsequent purchaser. *Taylor* v. *Bateman*, 92 N. C. 601. Consequently the plaintiff's claim rests upon the parol agreement, and the subsequent marriage and deed. No exactly similar case has been found, but purchasers for value with notice and attaching creditors have been protected against subsequent memoranda of oral transfers or performance of oral contracts. *Asher* v. *Brock*, 95 Ky. 270; *White* v. *O'Bannon*, 86 Ky. 93; *Sampson* v. *Thornton*, 3 Met. (Mass.) 275. In the principal case the contract with the wife was unenforceable at the time of the first conveyance, which was therefore entirely lawful. *Cf. Van Cloostere* v. *Logan*, 149 Ill. 588. Aside from the question of dower, the plaintiff had no equity at that time, and it is submitted that it would be going far to allow a subsequent memorandum to affect the first grantees.

SURETYSHIP — STATUTE OF LIMITATIONS — EFFECT OF DISCHARGE OF PRINCIPAL. — The defendant, having mortgaged his property, sold it to one who promised to pay the mortgage debt. The court found that the mortgagee accepted him as her debtor so that she became bound by the relation of suretyship existing between the mortgagor and the buyer. The statute of limitations ran against the mortgagee's claim as to the buyer, but the mortgagor had been out of the state, so that the statute had not run in his favor. *Held*, that as the mortgagor was the surety of the buyer, the creditor's right of action against him is barred also. *Mulvane* v. *Sedgley*, 64 Pac. Rep. 1038 (Kan.).

As in the ordinary contract of suretyship, the promise of the surety to pay was conditioned on no act of the creditor. *Cf. Campbell* v. *Sherman*, 151 Pa. St. 70. In order to hold a surety, the creditor need not first sue the principal, for mere indulgence to the principal does not discharge the surety, though he is injured thereby. *Hunt* v. *Bridgham*, 2 Pick. (Mass.) 581. As is well known, the statute of limitations does not destroy the obligation of a contract, but merely bars the remedy *Cf. Grovenor* v. *Signor*, 88 N. W. Rep. 278. It is not easy, therefore, to find a ground on which to support the principal case. The surety could have protected himself by bringing a bill in equity to compel the principal to pay. *Bishop* v. *Day*, 13 Vt. 81. He may also, if required to pay the obligation himself, sue the principal for indemnity, and since this right of action arises only on payment, it is not barred by the running of the statute in favor of the principal as to the original debt. *Thayer* v. *Daniels*, 110 Mass. 345. It is established that if a creditor fails to bring an action against the administrator of a deceased debtor within the time of the special statute applicable in such cases, the surety is not discharged. *Minter* v. *Branch Bank, etc.*, 23 Ala. 762. It seems that in the principal case equally the surety should be held liable. Such was the decision in *Whiting* v. *Clark*, 17 Cal. 407; *contra*, *Auchampaugh* v. *Schmidt*, 70 Ia. 642.

TORTS — DRUNKENNESS — INTENTIONAL INJURIES. — The defendant insured the plaintiff against accident under a policy exempting from liability for injuries intentionally inflicted. The plaintiff was bitten by a drunken man. *Held*, that the defendant is not liable. *Northwestern Benevolent Society* v. *Dudley*, 61 N. E. Rep. 207 (Ind., App. Ct.). See NOTES, p. 487.

TORTS — INJUNCTION — PICKETING. — A strike was declared against the plaintiff by the defendant union. The plaintiff brought a bill in equity against the union and other defendants to restrain them from picketing its factory. *Held*, that the bill is properly brought. *Dayton, etc., Co.* v. *Metal Polishers, etc., Union*, 11 Dec. (Ohio) 643 (Com. Pleas). See NOTES, p. 482.

WILLS — CONSTRUCTION — INCONSISTENT DEVISES. — A testator devised to his wife "all his real and personal property." By a later clause he devised the real estate, "at the death of my said wife," to his daughters. *Held*, that a fee simple is given to the wife, and the devises to the daughters are void as repugnant. *Fenstermaker* v. *Holman*, 61 N. E. Rep. 599 (Ind., App. Ct.).

In Indiana the common law rule ordinarily prevails, that a general devise gives only a life estate; but where a will disposes of realty and personalty in the same words, since the entire estate in the personalty passes, the devise of the realty is held to pass the fee. *Mulvane* v. *Rude*, 146 Ind. 476. The purpose of this exception is clearly to carry out the testator's intention, the fundamental object in construing a will. *Finlay* v. *King's Lessee*, 3 Pet. 346, 377; *Whitcomb* v. *Rodman*, 156 Ill. 116. But this intention should be gathered from the entire will. *Dickison* v. *Dickison*, 138 Ill. 541; *L'Etourneau* v. *Henquent*, 89 Mich. 428. The court decided the principal case on the ground that where a devise in fee is made, a later restriction fails. *Yost* v. *McKee*, 179 Pa. St. 381. A rule of construction, laid down to carry out the testator's intention, is thus regarded as a fixed rule of law, and invoked to defeat what, viewing the will as a whole, appears to be the testator's intention. The sound position would seem to be that mere rules of construction should always yield to clearly expressed intention; and accordingly the wife should have been held to have only a life estate. See *Matter of James*, 146 N. Y. 78.

WILLS — EFFECT OF BENEFICIARY'S DEATH ON DISTRIBUTION OF INCOME — VESTING OF PRINCIPAL. — A fund was bequeathed to trustees to pay the income to J. for the support of herself and infant children, each child on coming of age to receive a share of the income, "the same being divided into as many equal shares as there shall be children . . . and one more share for" J. At J.'s death the trustees were to pay over the fund to the children "and if any of said children shall have died leaving issue, such issue shall receive their parent's share." One of the children attained majority and died testate in his mother's lifetime leaving no issue. *Held*, that he had no interest in the income which he could dispose of by will, and that the entire future income should be redistributed among the surviving beneficiaries. *Dougherty* v. *Thompson*, 167 N. Y. 472.

The will contained no provision for the contingency of a child dying without issue before the mother In supplying this omission the court assumes, fairly enough, that, except when otherwise provided, the income was intended to go as nearly as possible in the same way as the principal. In construing the provision as to the distribution of the fund, the court infers from the omission above-mentioned, coupled with the devise to issue of deceased children, that any child's right to share in the principal was intended to be contingent on his surviving the mother. This inference, which serves to support the decision as to the income, is one neither necessary nor reconcilable, with the authorities. Postponement of distribution, if due merely to the existence of life interests, does not prevent rights in a principal fund from vesting immediately; and this though the intended class may increase before the distribution. *In re Bennett's Trust*, 3 K. & J. 280; *Stanley* v. *Stanley's Adm.*, 92 Va. 534; *Budd* v. *Haines*, 52 N. J. Eq. 488. In the principal case, the shares having vested, the issue of deceased children would take by executory devise, but in default of such issue there is no provision by which the shares could be divested. See *Strother* v. *Dutton*, 1 DeG. & J. 675; *cf. Smither* v. *Willock*, 9 Ves. Jun. 233. These considerations seriously discredit the decision as to the income.